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In the Supreme Court of the United States

October Term, 1980

JENNY MANSUKHANI,
Plaintiff and Appellee,
Petitioner,

vs.

DONALD AND JEAN PAILING,
Defendants and Appellants,
SANDY PAILING, JANE DOE AND
RICHARD ROE,
Defendants,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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QUESTIONS PRESENTED FOR REVIEW

Does the suspension of the writ of habeas corpus by the Supreme Court of North Dakota in the matter of withholding children from the parents by strangers violate Article I, Section 9 of the United States Constitution?

Does the relegation of a parent seeking custody and visitation to a neutered status, that is of no greater right than any challenger, without any process of law whatsoever, violate the due process clause of the United States Constitution?

Does the disposition of custody of the children of a divorced parent as against nonparents based upon the best interest of the children deny the divorced parent equal protection of the law?

PARTIES

Jenny Mansukhani is the petitioner, appellee, plaintiff and mother. Donald Pailing is the appellant, defendant and grandfather. Jean Pailing is the appellant, defendant and grandmother. Sandy Pailing is the defendant and aunt. Richard Roe and Jane Doe are any other persons holding Jenny Mansukhani's children and were defendants.

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DONALD AND JEAN PAILING,
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Defendants,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Petitioner prays for the issuance of a Writ of Certiorari to the Supreme Court of North Dakota to review the decision in the case of Jenny Mansukhani, Plaintiff and Appellee v. Donald and Jean Pailing, Defendants and Appellants, Sandy Pailing, Jane Doe and Richard Roe, Defendants.

OFFICIAL REPORT OF OPINION DELIVERED BELOW

The decision and opinion of the North Dakota Supreme Court in *Mansukhani v. Pailing* is reported in 300 N.W.2d 847 (ND 1980).

JURISDICTION

The statutory authority for issuance of a Writ of Certiorari is 28 U.S.C. 1257 wherein it is provided that the court is authorized to issue said writ in any case where a final judgment has been passed upon by the highest court of a state and where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3).

The decision and opinion of the North Dakota Supreme Court in *Mansukhani v. Pailing* was made and filed on the 19th day of December, 1980.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, §9, United States Constitution:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Amendment XIV, Sec. 1, United States Constitution:

All persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deprive any person within its jurisdiction of the equal protection of the laws.

STATEMENT OF FACTS

Jenny Mansukhani has not had the care, custody, control, supervision or company of her children for six months nor is it likely she will have for an additional twelve months, not because any court ever ruled she should not, but because the North Dakota Supreme Court suspended the Writ of Habeas Corpus.

When Jenny Mansukhani and her first husband, James Pailing, were divorced, Mrs. Mansukhani agreed to placement of their two children with James Pailing, their father. She retained and was given the right to custody overnight and on weekends. The children lived for three years with their father who usually lived with his parents, Donald and Jean Pailing and his sister, Sandy Pailing. On July 22, 1980, James Pailing died. On August 4, 1980, Jenny Mansukhani brought a Writ of Habeas Corpus against Donald, Jean and Sandy Pailing to obtain the release of the children from their possession. The Pailings appeared at the hearing on the writ and asked for a full evidentiary hearing on the issue of the best interests of the children. The trial court denied the full hearing because there had been no showing that Jenny Mansukhani was unfit. He granted the Writ of Habeas Corpus and ordered the children to be permanently turned over to Jenny Mansukhani following a one-month adjustment period. After the adjustment period, the Pailings appealed and had stayed by the North Dakota Supreme Court the transfer of the children. During the appeal period, the mother sought enforcement of her rights to custody overnight and on weekends. The trial court again granted such. The North Dakota Supreme Court stayed the order leaving contact between the mother and children solely within the discretion of the grandparents or aunt or their lawyer.

On appeal before the North Dakota Supreme Court were two issues. First, were the Pailings entitled to a full evidentiary hearing thus violating the time provisions of the Writ of Habeas Corpus? Second, can the "best interest of the child" standard be invoked by a nonparent against a parent without a showing of abandonment, unfitness or some other triggering circumstance?

The North Dakota Supreme Court reversed the lower court and sent the case back for a full hearing to determine the best interest of these children. In so doing, they declared that the Writ of Habeas Corpus is not available where a child is withheld from its parent. They also held that a parent has no greater rights to custody of his or her children than any other person.

The deprivation of due process and denial of equal protection of a parent relegated to nonparent status was first raised at the appellate level by the appellee, Jenny Mansukhani in her brief.

"The second concern of the Court in *Kottsick* was the possible constitutional problems of essentially finding a parent unfit without due process of law. This concern is equally applicable for Mrs. Mansukhani. In *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 an unwed Father was entitled to a hearing on his fitness before his children were taken from him on the death of their mother. Without a hearing as to his fitness, he was denied Due Process. As this Court stated, '(I)f an unwed father has a right to a hearing as to his fitness, and *Stanley* has so held, the right of a married father, divorced from the mother, certainly cannot be any less.' *Kottsick,* 846. Obviously the transposition of sex from Father as in *Stanley* to Mother as in Mansukhani does not alter this Court's reasoning.

"Additionally, if a custody award is to act as a finding of unfitness, leaving only the best interest to remove the Children from the parent, not only due process is denied Mrs. Mansukhani but also equal protection under the Fourteenth Amendment. Divorced parents treated differently under the laws than are married parents or even unwed parents denies them equal protection. Also children of divorced parents are treated differently than children of married or unwed parents again violating their Fourteenth Amendment right." (Appellee's Brief, pp. 23, 24.)

The North Dakota Supreme Court eliminated the Writ of Habeas Corpus for a child detained from its parent on its own, without request, briefing, or argument by either party. The dangers and illegality of eliminating a speedy process of release of a detained child was raised by Jenny Mansukhani in her brief.

"A quick and summary procedure is vital. If a parent must await a full juvenile court investigation and full civil discovery to recover a child from a reluctant custodian, be it babysitter, relative or even kidnapper, great harm and injustice befalls both." (Appellee's Brief, p. 31.)

ARGUMENT

The Writ of Habeas Corpus has been used to obtain custody of children since 1913 in North Dakota. After 57 years, the Supreme Court of North Dakota eliminated this summary procedure for release of children substituting "an action or proceedings . . . using a complaint, petition or application stating the facts and the nature of the matter and the remedial relief sought . . . and requesting an evidentiary hearing." By eliminating the summary procedure, the Grand Writ, the Court violated Article I, §9 of the United States Constitution.

Two weeks after the father's death, the mother, Mrs. Mansukhani, obtained a Writ of Habeas Corpus. After an immediate hearing and a one-month adjustment period, the children were to be reunited with her. Then the nonparents appealed. Even though hastened there was no decision on the appeal until December of 1980. A judge was not finally assigned for a new hearing until February 16, 1981. Full civil discovery must now be done. After the hearing, there will be an appeal. It may well be another twelve months until this mother can guide, supervise, nurture, care for and have custody of her children. The delay caused by the elimination of the writ exacerbates these children's already sorry state. One of the children is mentally and emotionally handicapped, yet nothing is being done to help her. Both children are exceedingly undisciplined, yet the mother must sit back and allow this to continue satisfied only with an occasional short visit when the nonparents and their attorney consent to visitation. Summary release has been denied these children and they and their mother both suffer.

The substitution of a full-blown civil action does not provide an effective remedy for the test of the legality of the children's detention. The children withheld from their mother will not be released until full civil litigation with its concomitant delays for discovery, time to answer, and calendering have passed. Where there is the elimination of the writ by the substitution of a remedy, the elimination is unconstitutional unless the substitute is effective.

". . . the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Presley*, 430 U.S. 372, 381 (1977).

Once the petitioner does get into court, she finds that sometime during the delay, without a hearing or any legal

process she has lost her parental status. The North Dakota Supreme Court has declared that for this mother to be reunited with her children she must show it to be in their best interest.

This mother and the children's father divorced each other, and the children had to be placed with one parent or the other. As between the two, by agreement of the parents, with no finding of unfitness, the court placed the children with their father except for custody overnight and weekends with their mother. The decision was based upon the best interest of the children as between two parents, two parties of equal right.

When the father died two and a half years later, this decision as between the two parents was converted to one as between the mother and all claimants. She now has to show that the reunion of herself and her children is in their best interest, better than anyone else can offer.

This conversion from a determination of custody between parents to a stripping of parental priorities to their children was done without hearing or process. As such it is violative of both the children's and the mother's rights to due process guaranteed by the 14th Amendment of the United States Constitution.

The right lost by the petitioner is not minimal. In *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, this court restated the recognition of the importance of the family. The right to raise one's children is essential, basic civil rights of man, far more precious than property rights. And further, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

In *Stanley* a parent could not constitutionally have the custody of his children removed without a hearing as to his fitness. Yet the North Dakota Supreme Court has declared the mother's fitness to be irrelevant and she can be denied custody if it be in the best interest of the children. *Stanley* protected the rights of an illegitimate father, the petitioner is a divorced mother. This despite the determination by this Court that the family rights of a divorced parent are even greater than those of an illegitimate parent. *Quillon v. Walcott,* 434 U.S. 246. The divorced parent, as with the petitioner, has had actual and legal custody of these children and shouldered significant responsibility for them prior to the divorce.

Presented to the court here is the situation so abhorred by this court in *Quillon v. Walcott,* 255 in quoting Justice Stewart's concurrence in *Smith v. Organ of Foster Families For E. & Reform,* 431 U.S. 816, 97 S.Ct. 2094, 31 L.Ed.2d 551 (1977). "We have little doubt that the Due Process Clause would be offended 'if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest,'." The father is dead and his objections, if any, are impossible to note. The children, ages four and six, are too young to express objections. The mother seeks to have her children released from the grandparents and returned to her. The mother and the children are the natural family. Only if the mother had been found to be unfit would the placement in the children's best interest be relevant. Until then, she and the children must be the family.

If the fact of the divorce is such as to trigger the best interest standard as between a parent and nonparent, then the petitioner has been denied the equal protection

of the laws contrary to the Fourteenth Amendment of the United States Constitution.

As a divorced parent, the petitioner must scramble with all interested caretakers for position of the provider of the best interest of the children. Were she still married to the father and the children's custody or possession withheld from her it appears from the North Dakota decision that they both would also be forced to undergo a civil proceeding with a full evidentiary hearing to regain custody of their own children. If, however, that is not the holding of the case, then she as a divorced parent is being treated differently than other parents, by the state, and is thus being denied the equal protection of the laws.

Again as in *Stanley* if an illegitimate parent is entitled to be treated as legitimate parents in the custody, care and nurturing of the children, so too must be the divorced parent.

CONCLUSION

The mother is not as rich nor is she as big and strong as the grandparents. She is not physically able to snatch her children back nor rich enough to hire someone to do so on her behalf. She has to rely on the law. But what law?

Habeas corpus is the only speedy relief she can have pending some final decree long down the road of justice. Have we come to the point where the Great Writ is reserved to the use of those accused of crime?

Dated this 18th day of March, 1980.

Respectfully Presented,

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APPENDIX

Jenny MANSUKHANI, Plaintiff
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v.

Donald and Jean PAILING, Defendants
and Appellants,
Sandy Pailing, Jane Doe and Richard
Roe, Defendants.

Civ. No. 9855.

Supreme Court of North Dakota.

Dec. 19, 1980.

Mother brought habeas corpus proceeding to obtain custody of her children after death of her ex-husband. The District Court, Burleigh County, Gerald G. Glaser, J., awarded mother eventual custody and immediate visitation rights, and paternal grandparents, who had actual custody of children after their son's death, appealed. The Supreme Court, Sand, J., held that: (1) where mother used a writ of habeas corpus, not to free her children from unlawful denial of their liberty, or to enforce a decree or judgment, but to obtain custody of the children, such proceeding required giving full faith and recognition to the legal and equitable concepts of the "best interests of the child;" (2) trial court erred in awarding mother custody of her children in habeas corpus proceeding, after paternal grandparents, who were caring for children after the death of the father made an adequate request before the trial court to convert the habeas corpus proceedings into an evidentiary hearing, which was necessary under the circumstances; and (3) where the district court issued a bench order allowing mother to immediate overnight visitation of her children, after the Supreme Court had issued a stay

of a previous district court order covering substantially the same subject, the bench order was null and void.

Remanded with directions.

1. Habeas Corpus (Key) 1

Habeas corpus is a summary proceeding primarily used and designed to liberate a person from illegal confinement.

2. Habeas Corpus (Key) 99(1)

When writ of habeas corpus is used to obtain custody of a child it becomes an equitable action in which equitable principles must be employed. NDCC 14-09-06, 32-22-01 et seq.

3. Habeas Corpus (Key) 99(1)

The objectives and procedures used in a writ of habeas corpus are unrealistic and inappropriate for determining the custody of a child, especially because of changed circumstances where the best interests of the child are involved, as the usual habeas corpus proceeding does not provide the aids and benefits which are associated with an evidentiary hearing and are essential in a child custody matter. NDCC 14-09-06, 32-22-01 et seq.

4. Infants (Key) 19.3(5)

Better practice than habeas corpus proceeding for a litigant seeking custody of a child because of changed circumstances is to initiate an action or proceeding by using a complaint, petition, or application stating the facts and the nature of the matter and the remedial relief sought, or by a motion if the parties are the same as those in the divorce decree or judgment, and requesting an evidentiary hearing whenever the evidence is in dispute. NDCC 14-09-06, 32-22-01 et seq.

5. Habeas Corpus (Key) 99(3)

Where mother used a writ of habeas corpus, not to free her children from unlawful denial of their liberty, or to enforce a decree or judgment, but to obtain custody of the children because of the death of her ex-husband, such proceeding required giving full faith and recognition to the legal and equitable concepts of the "best interests of the child." NDCC 14-09-06, 32-22-91 et seq.

6. Habeas Corpus (Key) 99(1)

Proceedings in habeas corpus to obtain custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules. NDCC 14-09-06, 32-22-01 et seq.

7. Habeas Corpus (Key) 99(1)

Trial court erred in awarding mother custody of her children in habeas corpus proceeding, after paternal grandparents, who were caring for children after the death of their son, made an adequate request before the trial court to convert the habeas corpus proceedings into an evidentiary hearing, which was necessary under the circumstances. NDCC 14-09-06, 32-22-01 et seq.

8. Habeas Corpus (Key) 99(1)

In context of child custody proceeding, death of father, who was custodial parent of children, constituted a "change in circumstances," even though physical or actual custody was with the paternal grandparents.

See publication Words and Phrases for other judicial constructions and definitions.

9. Habeas Corpus (Key) 113(7)

Where the district court issued a bench order allowing mother to immediate overnight visitation of her children, after the Supreme Court had issued a stay of a previous district court order covering substantially the same subject, the bench order was null and void.

Mills & Moore, Bismarck, for plaintiff and appellee; argued by Sherry Mills Moore, Bismarck.

Chapman & Chapman, Bismarck, for defendants and appellants; argued by Daniel J. Chapman, Bismarck.

SAND, Justice.

Donald and Jean Pailing, the grandparents of the children, appealed from a district court judgment arising out of a petition for writ of habeas corpus and also from a district court bench order, all pertaining to the mother's visitation rights with her children.

James A. Pailing and Jenny Pailing were married and had two children, Jennifer Ann and Allen Anthony. On 4 Oct. 1977 they were divorced. Custody of the two minor children was awarded to James A. Pailing, the father, with "reasonable visitation rights including the right to have custody of said children overnight and on weekends" to the mother, Jenny Pailing. After the divorce, James Pailing, with the children, lived with his parents, Donald and Jean Pailing. The mother, Jenny Pailing, remarried and is now Mrs. Jenny Mansukhani. In July 1980 the father, James Pailing, was killed in an automobile accident. The children continued to live with their grandparents, Mr. and Mrs. Don Pailing.

The grandparents and the mother disagreed as to who should have custody of the children. Neither could they

agree on the conditions under which the mother could exercise her visitation rights. The mother filed a writ of habeas corpus petitioning the district court for custody of the children.

There was a dispute as to when the mother last visited the children, whether it was on 11 Dec. 1978, according to grandparents Pailing, or April 1979 according to the mother, Jenny M. Mansukhani.

After a brief hearing, the court issued a judgment containing the following pertinent provisions:

> "1. Jenny Mansukhani being the mother and having a priority over said children as such shall be awarded the custody.
>
> "2. There shall be a transitional period during which Jenny Mansukhani shall be entitled to the following visitation:
>
> That upon 24 hours notice to the Pailings, she may take the children from 8 o'clock a.m. to 8 o'clock p.m. the same day. On her fourth visit, she may have the children for a 48 hour period.
>
> "3. The transitional period shall end one week after Jenny Mansukhani has completed four visits made at least one week apart.
>
> "4. At the end of the transitional period, physical possession and custody of the children shall be transferred to Jenny Mansukhani."

The grandparents, Mr. and Mrs. Donald Pailing, filed a petition with the district court for reconsideration and a stay order, which was denied. The grandparents then appealed to this Court and sought a stay of the visitation order of the district court, which was granted. This was

followed by further proceedings in the district court resulting in a bench order allowing the mother to immediate overnight visitations. The bench order, upon application of the grandparents, was also stayed by this Court.

The principle issue is whether or not the procedures for writ of habeas corpus without an evidentiary hearing are appropriate for the determination of custody of the children. A related issue is whether or not the death of the father constituted a change of circumstances so as to modify the divorce decree and the custody judgment which did not provide with specificity the circumstances under which visitation could be had.

[1, 2] Generally habeas corpus is a summary proceeding primarily used and designed to liberate a person from illegal confinement. 39 Am.Jur.2d *Habeas Corpus*, §§ 2, 9. It is a common law prerogative writ and has been used in child custody matters for many years. 39 Am.Jur. 2d *Habeas Corpus*, §§ 8, 118. We can only speculate when it was first used in child custody cases and why it was used. However, when the writ is used to obtain custody of a child it becomes an equitable action in which equitable principles must be employed. *In re Wagner*, 84 N.W.2d 587 (N.D.1957).

[3] The writ of habeas corpus[1] has been used to obtain custody of a child since 1913, or earlier, in this State. *Knapp v. Tolan*, 26 N.D. 23, 142 N.W. 915 (1913). However, an examination of the general procedures and statutory provisions of Chapter 32-22, NDCC, relating and applying to habeas corpus, leads us to the inescapable conclusion that the objectives and procedures used in a writ

1. Section 14-09-06, NDCC, specifically provides that when the husband and wife are separated habeas corpus may be used to inquire into the custody of the child or children and may award custody to one or the other under such regulations as the case requires.

of habeas corpus unless substantially modified are unrealistic and inappropriate for determining the custody of a child especially because of changed circumstances where the best interests of the child are involved.

In a habeas corpus proceeding evidence is generally presented in the form of verified pleadings and affidavits. Consequently, if the evidence is in dispute, which usually is the situation in child custody matters where the best interests of the child are paramount, the judge as the trier of facts does not have the benefit of observing the demeanor of the witnesses (verifier of pleadings and affiants). Neither does the judge or the parties have the benefit of cross-examination. In addition, the affidavits are frequently couched in conclusionary statements consisting of an interrelated mixture of fact and law, making the decision more complex. The judge in a custody case has a most difficult responsibility. An evidentiary hearing would be of great aid and benefit to the judge in examining and weighing the evidence before making the all-important findings of fact.

The usual habeas corpus proceeding without substantial modification does not provide the aids and benefits which are associated with an evidentiary hearing and are essential in a child custody matter.

[4] It, therefore, seems logical, and we believe it would be more appropriate and would be a better procedure for a litigant seeking custody of a child because of changed circumstances,[2] to initiate an action or proceedings by using a complaint, petition, or application stating the facts and the nature of the matter and the remedial relief sought [see, *Galloway v. Pruitt*, 469 S.W.2d 556, 558

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2. The writ of habeas corpus is probably more pertinent in "child snatching" cases than in other cases because of the nature of the issue involved which comes close to liberating an "imprisoned" child.

(Ky.1971)], or by a motion if the parties are the same as those in the divorce decree or judgment, and requesting an evidentiary hearing whenever the evidence is in dispute.

We also believe that the trial judge will accord priority to proceedings of this nature and will expeditiously hear and determine the issues and exercise sound discretion, all within the framework of due process.

With reference to special procedural remedies, in *State v. Morrissey*, 295 N.W.2d 307, 309 (N.D.1979), Justice Paulson, writing for the Court, said:

> "Recently this court has experienced an increasing use among North Dakota practitioners of these somewhat antiquated and dust-laden procedural devices. [Writs of certiorari, mandamus, and prohibition.] It may well be time for the Legislature to take a long and searching look at these devices to determine how they fit into modern legal practices."

To this we add that the time may be appropriate for the Legislature to review all of the special proceedings under the title "Judicial Remedies" with a view of bringing them in line with the modern practice which no longer employs the strict common law pleading. In making this observation we are not suggesting the elimination of habeas corpus which is protected by Section 5 of the North Dakota Constitution providing that the writ of habeas corpus shall not be suspended except under certain conditions. We are merely observing that a writ of habeas corpus was not designed for matters other than originally intended. Other proceedings may be employed as mentioned earlier herein. We note that the various writs which were formerly found in Sections 87 and 103 of the old Judicial Article have been removed and are now merely referred to as writs necessary to the proper administration of justice in Sections 92 and 86 of the new Judicial Article.

In the instant case, based upon the hearing and proceedings before the trial court on 17 Oct. 1980 there appears to be a mild confusion, or at least some uncertainty, as to what specific remedy Jenny Mansukhani sought. It appears that the mother, Jenny Mansukhani, sought actual custody of the children as distinguished from visitation rights. Her custody claim is predicated on the premise that when the father died she automatically became entitled to custody of the children. In any event, or at the very least, she contended she is entitled to continued visitation rights in accordance with the divorce decree. The divorce decree merely provided for "reasonable visitation rights including overnight and weekend visits" without spelling out the details. Furthermore, prior to the father's death any agreement that may have existed between the father and mother as to visitation rights was not in writing.

[5] Relying on the judgment issued in the instant case, the writ was not used to free children unlawfully denied of their liberty or to enforce a decree or judgment but was used in an effort to obtain custody of the children because of changed circumstances which requires giving full faith and recognition to the legal and equitable concepts of the best interests of the child.

[6] We share the concern of the trial court as garnered from the record that the writ of habeas corpus[3] is simply not designed to meet the basic judicial procedures and requirements for determining the custody of a child.

[7] The grandparents made an adequate request before the trial court to convert the habeas corpus proceedings into an evidentiary hearing, which we believe is necessary under the circumstances in this case. We be-

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3. Proceedings in habeas corpus to obtain custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules. *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980).

lieve the ends of justice will be better served if an evidentiary hearing is held and, accordingly, the judgment of the district court is vacated and the case is remanded in line with the views expressed in this opinion for an evidentiary hearing.

[8] We conclude that the death of the father, who had legal custody of the children, constitutes a change in circumstances even though physical or actual custody was with the grandparents. The court, however, must take into account all of the surrounding circumstances in reaching its decision.

[9] The bench order[4] of the trial court issued on 17 Oct. 1980 was issued after the notice of appeal was filed with the clerk of court on 10 Sept. 1980 and after the Supreme Court had issued its stay order on the 12th day of September, 1980, covering substantially the same subject, and under these circumstances the bench order was and is null and void.

On remand, we invite the trial court's attention to the principles of equity and law expressed in *Hust v. Hust*, 295 N.W.2d 316 (N.D.1980); *J. L. R. v. Kidder County Social Services Board*, 295 N.W.2d 401 (N.D.1980); *In Interest [Custody] of D. G.*, 246 N.W.2d 892 (N.D.1976); *Bjerke v. D. T.*, 248 N.W.2d 808 (N.D.1976); and *McKay v. Mitzel*, 137 N.W.2d 792 (N.D.1965), together with other citations and case law referred to by the above cases on the subject matter.

These cases clearly express the rule of law that the court must be concerned with the best interests and welfare

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4. Because of the disposition of the bench order, it will not be necessary to resolve whether or not the bench order is appealable. Nevertheless, because the subject matter involves the basic jurisdiction of the court, we state this caveat that a party filing a notice of appeal on a bench order will have the full responsibility of convincing this Court that the order is appealable under the laws of this State.

of the child by taking into account all of the pertinent facts and surrounding circumstances which may have a bearing on or influence the child's welfare. Some of these cases also establish that the rights of a biological parent are not necessarily always paramount but must be balanced with the best interests and welfare of the child.

This case is remanded with directions to hold an evidentiary hearing to determine whether the mother or grandparents shall have custody of the children and who may have visitation rights with conditions, if any.

ERICKSTAD, C. J., and VANDE WALLE, PEDERSON and PAULSON, JJ., concur.

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Jenny Mansukhani, Petitioner,

vs.

Donald Pailing, Jean Pailing, Sandy Pailing, Jane Doe, and Richard Roe, Respondents.

State of North Dakota)
) ss
County of Burleigh)

PETITION FOR WRIT OF HABEAS CORPUS

Comes now the petitioner, Jenny Mansukhani, and for her cause of action alleges and states:

1. That she does hereby apply for a Writ of Habeas Corpus based upon her affidavit attached and such further and additional evidence as may be produced at the time of the hearing.

2. That Jenny Mansukhani is the natural mother of two minor children, Jenny Pailing and Allen Anthony Pailing (hereinafter referred to as the Minor Children.)

3. That the Minor Children are presently being held by Donald Pailing, Jean Pailing, Sandy Pailing and others at 3201 E. Rosser Avenue, Bismarck, North Dakota.

4. That James Pailing the natural father, was awarded custody of the children by a divorce decree in a default hearing in Mclean County in October of 1977.

5. That Jenny Mansukhani (then Pailing) was awarded visitation including overnights and weekends and was not and could not be found to be an unfit parent.

6. That the natural father James A. Pailing was killed in an automobile accident on July 22, 1980.

7. That the petitioner, Jenny Mansukhani, has demanded and been refused visitation outside the home of the respondents or custody of the children by the Pailings.

8. That Jenny Mansukhani on behalf of the children hereby applies for the issuance of a writ of habeas corpus directing the release of the minor children into her custody.

9. That further the petitioner, Jenny Mansukhani further seeks an order of the court awarding her custody of the children pending any further proceedings.

I, Jenny Mansukhani, do swear that the above petition is true and accurate in all respects.

/s/ Jenny Mansukhani
Jenny Mansukhani

Subscribed and sworn to me this 4th day of August, 1980.

/s/ Sherry Mills Moore
Sherry Mills Moore, Notary Public
Burleigh County, North Dakota
My Commission Expires 12/4/85

/s/ Sherry Mills Moore
Sherry Mills Moore
Attorney for Petitioner
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. .....

Jenny Mansukhani,
Petitioner,

vs.

Donald Pailing, Jean Pailing, Sandy Pailing, Jane Doe, and Richard Roe,
Respondents.

WRIT OF HABEAS CORPUS

TO: Donald Pailing, Jean Pailing, Sandy Pailing and Jane Doe and Richard Roe:

You are hereby commanded to have Allen Anthony Pailing and Jennifer Pailing by you detained, as is alleged, together with the time and cause of such imprisonment and detention by whatever name the said Donald Pailing, Jean Pailing, Sandy Pailing, Jane Doe and Richard Roe shall be called before Judge Gerald Glasser, Judge of the District Court, at 9:30 a.m. on August 8, 1980, to do and receive what shall then and there be considered concerning the said Allen Anthony Pailing and Jenny Pailing, and have you then and there this writ.

By The Habeas Corpus Act
/s/ Gerald G. Glaser
Judge Gerald Glaser

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL No. 29959

Jenny Mansukhani,
Plaintiff,

vs.

Donald & Jean Pailing, Sandy Pailing,
Jane Doe and Richard Roe,
Defendants.

ORDER

The above entitled matter having come on for hearing at 9:30 o'clock a.m. on the 8th day of August, 1980, and there appearing Jenny Mansukhani, the mother of Allen Anthony and Jennifer Ann Pailing, together with her attorney, Sherry Mills Moore and there also appearing Donald and Jean Pailing the grandparents of said children and Sandy Pailing, the aunt of said children, together with their attorney, Carma Christensen and the parties having submitted their evidence and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises makes the following:

FINDINGS OF FACT

1. Jenny Mansukhani is a fit and proper person for the care and custody of the children Allen Anthony Pailing and Jennifer Ann Pailing.

2. Donald and Jean Pailing, the grandparents of said children are fit and proper persons for the care and custody of the children.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Jenny Mansukhani being the mother and having a priority over said children as such shall be awarded the custody.

2. There shall be a transitional period during which Jenny Mansukhani shall be entitled to the following visitation:

That upon 24 hours notice to the Pailings, she may take the children from 8 o'clock a.m. to 8 o'clock p.m. the same day. On her fourth visit, she may have the children for a 48-hour period.

3. The transitional period shall end one week after Jenny Mansukhani has completed four visits made at least one week apart.

4. At the end of the transitional period, physical possession and custody of the children shall be transferred to Jenny Mansukhani.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 11th day of August, 1980.

/s/ Gerald G. Glaser
Judge Gerald Glaser

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL DISTRICT

Civil No. 29959

Jenny Mansukhani,
Plaintiff,

v.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants.

MEMORANDUM OPINION

I have considered the petition for reconsideration and stay of execution of judgment.

I was aware of the decisions cited therein but did not consider them appropriate. The decision was based upon the record before me and is in accordance with fundamental concepts, to wit: that a natural parent, whose parental rights have not been terminated and against whom there has been no determination of unfitness, is presumptively entitled to regain physical possession of the child upon the death of the other parent.

I note the reference to a motion for new trial. That motion will be heard when duly entered.

The children will not be adversely affected if they remain in the custody of their mother pending decision thereon. The request for a stay is therefore denied.

Signed this 12th day of September 1980, at Bismarck, North Dakota.

BY THE COURT:

/s/ Gerald G. Glaser
Gerald G. Glaser, District Judge

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants and Appellants.

ORDER GRANTING STAY

The Court had under consideration a Petition for Stay of Execution Pending Appeal in this case, filed by counsel for the Defendants and Appellants.

ORDERED, that the Supreme Court hereby grants a stay of execution of judgment pending final determination of the appeal from the Judgment dated August 22, 1980. This Order is entered subject to Rule 27(b), NDRAppP.

The Supreme Court of the State of North Dakota convened at 4:45 p.m. this 12th day of September, 1980, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Wm. L. Paulson, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, Justices; and the Clerk of the Supreme Court, Luella Dunn, being present and directed the entry of the above order.

/s/ Luella Dunn
Luella Dunn, Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants and Appellants.

ORDER

A Motion to Vacate Stay of Execution Pending Appeal was filed on behalf of Plaintiff-Appellee on September 19, 1980. After consideration the Court:

ORDERED, that further consideration and determination of the Motion will be made on the pleadings after Appellant's response to the Motion to Vacate Stay of Execution Pending Appeal has been served and filed with service and filing to be made no later than 4:00 p.m., September 25, 1980.

The Supreme Court of the State of North Dakota convened at 4:00 p.m. this 22nd day of September, 1980, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Wm. L. Paulson, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, Justices; and the Clerk of the Supreme Court, Luella Dunn, being present and directed the entry of the above order.

/s/ Luella Dunn
Luella Dunn, Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Case No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants-Appellants.

MOTION TO VACATE STAY OF EXECUTION PENDING APPEAL

Comes now the Appellee in the above entitled matter who moves to the Supreme Court to Vacate the Stay of Execution pursuant to Rules 27(b) of the Rules of Appellate Procedure for the following reasons and upon the following grounds:

I

That the petitioner, Jenny Mansukhani, is the mother and sole living parent of Jennifer Pailing and Allen Anthony Pailing and will be hereinafter referred to as Mother. That James Pailing, now deceased, is the Father (hereinafter referred to as Father), Jean Pailing is the paternal Grandmother (hereinafter referred to as Grandmother), Donald Pailing is the Grandfather (hereinafter referred to as Grandfather except when referred to collectively along with Jean Pailing as the Grandparents), and Sandy Pailing is the Aunt (hereinafter referred to as Aunt) of Jennifer Pailing, and Allen Anthony Pailing (hereinafter referred to as the Children).

II

That the Children lived in the home of the Mother until she, no longer able to financially support them, agreed to relinquish custody to the Father subject to ample visitation (Mother's September Affidavit, P. 1; Mother's July Affidavit, P. 1). That the Children lived in the home of the Father from this time until his death on July 22, 1980.

III

On August 4, 1980, a Petition for Writ of Habeas Corpus was filed with the South Central District Court and was granted on August 4, 1980. The Writ demanded to know why the Children were being withheld from their legal custodian - the Mother.

IV

A hearing was held, testimony given, and appearances made by all parties represented by counsel. The Court heard the evidence and after argument by counsel for both parties made a decision. The Court's decision was that the Grandfather, the Grandmother, the Aunt and other parties had not shown cause why they were withholding the Children from the legal custodian, their Mother. (Court Order, August 11, 1980).

V

To ease the transition from the home of the Father to the home of the Mother, the Court ordered a period of visitation between the Children and the Mother prior to permanently joining their Mother. (Court Order, August 11, 1980).

VI

That the transition visitation was completed by the Mother as were all necessary preparations for their reunion. (Mother's September Affidavit, P. 2 and 3).

THE CLANDESTINE CONDUCT OF THE GRANDPARENTS AND COUNSEL HAS AND IS HARMING THE CHILDREN AS WELL AS IMPENDING JUSTICE.

VII

On September 10, 1980, counsel to the Grandparents prepared a Notice of Appeal, Undertaking on Appeal, Petition for Reconsideration and Stay of Execution of Judgment. Sometime between September 10th and September 12th, the Petition for Reconsideration and Stay of Execution of Judgment was considered and denied by Judge Glaser, South Central Judicial District. (Petition for Reconsideration and Stay of Execution of Judgment, Memorandum Opinion).

VIII

Sometime subsequent to Judge Glaser's decision of September 12th, a Petition for Stay of Execution Pending Appeal was filed with the Supreme Court. At 4:45 P.M. on Friday, September 12, 1980, the Supreme Court reviewed the Petition and granted the Stay. (Order Granting Stay).

IX

That on September 15, 1980, counsel for the Plaintiff learned that the Defendants had engaged new counsel, that the Defendants had filed a Petition for Stay of Execution Pending Appeal in the Supreme Court and by the attachment thereto that counsel for the Defendant had filed a Petition for Reconsideration and Stay of Execution of Judgment Pending Appeal in the South Central Judicial District Court. From the Clerk of Court of the South Central Judicial District, the Plaintiff's counsel learned the District Court had denied the Petition for Reconsideration and Stay of Execution of Judgment Pending Ap-

peal. From the Clerk of the Supreme Court, Plaintiff's counsel learned the Supreme Court had granted the Petition for Stay of the Execution Pending Appeal.

X

That on September 16, 1980, the Plaintiff's counsel received from the Clerk of the District Court Notice of Filing of Appeal, Notice of Appeal and Undertaking of Costs on Appeal.

XI

That the Plaintiff was completely uninformed until three days to five days after the fact that not one but two bodies of the judicial system were deciding without any input from the Mother whether her in-laws could detain her children, a decision which defacto terminates her parental rights. (Mother's September Affidavit, P. 4 and 5).

XII

That *no* notice, let alone reasonable notice, as required by Rule 8(b) of the Rules of Appellant Procedure, was given the Plaintiff.

XIII

The Plaintiff does not here seek to indulge in mere procedural whining but has lost her parental rights, without notice or opportunity to oppose this matter of substance.

XIV

That while the Grandparent's counsel was busy pursuing clandestine methods to allow the Defendants to continue to withhold the Mother's Children from the Mother, the Grandparents themselves were working to deflect the

Mother's attention by appearing to comply with the Court Order of August 10, 1980. (Mother's September Affidavit, P. 3).

XV

That the District Court in its decision of August 10, 1980, determined that the Grandparents had not shown good cause why they were and should withhold the Children from the Mother. To smooth the transition from the Father's home to the Mother's home, the Court also ordered a visitation period. The visitation would then lessen the impact of a sudden shift where one had just occurred, that is from the Father to the Grandparents, Aunt and others. During the transition, the Children were to become re-accustomed to the authority of the Mother and acquainted with their Stepfather, Stepsister and new home in Surrey, North Dakota.

XVI

That the Grandparents gave every indication that they too were abiding by the Court's decision. This act by the Grandparents led the Mother down the primrose path who as a result took the Children in the same direction by telling them of their pending move to Surrey, acquainting them with their Stepfather and Stepsister, reuniting them with their maternal Grandparents and other relatives and smoothing the way for their transfer. (Mother's September Affidavit, P. 2 and 3).

XVII

That after the fourth visit, the Mother wrote the Grandparents to tell them she would pick up the Children and their belongings on September 12, 1980, at 10:00 A.M. She later phoned to confirm it and was told she should

wait until 4:00 P.M. when Jennifer would finish kindergarten. She was called on September 11th and told that in fact the Order stated she was to pick up the Children one week from the completion of the last visit which in the interpretation of the Grandparents was September 14, 1980, not September 12, 1980. She agreed to pick up the Children on September 15, 1980, at 10:00 A.M. That not until September 13, 1980, at 9:00 A.M. was she informed, through another telephone call from the Grandparents, that she was not to call for the Children on the 15th because they belonged to the Grandparents until the end of the Court actions. (Mother's September Affidavit, P. 4 and 5).

XVIII

That until September 13, 1980, at 9:00 A.M., the Mother was led to believe by the Grandparents that they were complying with the Court Order. That in fact the Grandparents were transposing their schizophrenic behavior onto the Children by contemporaneously telling the Children that they were to move out of the two-bedroom apartment occupied by the four (now three) adults and two children into a new one, not in Minot but Bismarck, in which each child was to get his own room. That the Children were quickly enrooted in the community by enrollment in swimming lessons and, for Jennifer, in kindergarten. That while the Mother obeyed the Court's Order in undertaking the true nature of the Court's purpose in establishing a transition period, the Grandparents used the same period to quickly attempt to make themselves the psychological parents only to buttress a lawsuit. Yet, even worse, they also used the period to dissuade and in fact poison the Children's minds against their Mother. (Mother's September Affidavit, P. 3 and 4).

XIX

That contrary to the Grandmother's Affidavit but consistent with her testimony at the trial, the Father indeed played a strong role in the Children's life. He was the psychological parent as well as the actual parent. His death caused the loss of a psychological parent. It is doubtful that the Grandparents became the psychological substitutes between July 22nd and August 4th, 1980. (Mother-er's September Affidavit, P. 2).

XX

That contrary to the Grandmother's Affidavit but consistent with her testimony, "the only home the Children have known" since 1976 was in fact that of the Father, James Pailing. The Father's home often coincided with that of the Grandparents but also with the Aunts and the Uncles. That in fact the Children have been shifted from building to building and adult to adult since December, 1976. That the "only home the Children have known" has not only been one of a changing cast of characters but also stages. The Father, the Aunt, the Grandparents moved five months before the hearing from the "only home the Children have known" since December - Butte, North Dakota - to their two-bedroom apartment in Bismarck. This apartment is occupied by a present known cast of characters of the Grandparents and the Aunt and is the home from which to remove them would allegedly cause such irreparable harm. (Mother's September Affidavit, P. 2).

XXI

That contrary to the Grandmother's Affidavit but consistent with the Return to Motion, the testimony of the Grandmother and the Mother, the Mother did in fact exercise her visitation rights. On many occasions the Mother

exercised her visitation rights with the Children to the full extent allowed by, not the Court, but by James Pailing. That even after the many requests as well as consultations with legal counsel and contrary to the decree, the Mother was prohibited by the Father from having the Children overnight or on weekends. That her visits were within the emotional and physical restraints of the presence of the Father, the Aunt, the Grandmother, the Grandfather as well as others. (Mother's September Affidavit, P. 2 and 3).

XXII

That contrary to the Affidavit of the Grandmother but consistent with the Grandmother's testimony as well as the Affidavit of the Mother, the Children do know the Mother well enough to call her "mama" and to express their love for her. That no one else in the Children's lives is known as "mama" or anything close by the Grandmother's own testimony at trial. (Mother's September Affidavit, P. 3).

XXIII

That the District Court who heard the testimony and saw the parties was well aware of the length of separation between the Mother and the Children but still found her to be a fit and proper parent. (Court Order, August 11, 1980; Memorandum Opinion, September 12, 1980).

XXIV

That contrary to the implication of the Grandparent's petition but consistent with the testimony and Affidavit of the Mother, custody at the divorce proceedings was not given to Father, as opposed to the Mother, but by agreement of the Mother. There never has been any finding in any Court that there is a more suitable custodian than the Mother. The divorce proceedings was a default pro-

ceeding. As between the Father and the Mother, the Father got custody. To maintain the status quo pending the appeal, the Supreme Court must resurrect the Father. (Mother's September Affidavit, P. 1; Mother's July Affidavit, P. 1).

XXV

That contrary to the Grandmother's Affidavit, the Children have been willing, happy, even eager to visit their Mother in spite of the efforts of the Grandparents to make the Children feel otherwise. (Mother's September Affidavit, P. 3).

XXVI

That contrary to the Grandmother's Affidavit, the Children are not well adjusted in the home of the Grandparents. Their behavior is abominable with language and actions totally outside the realm of that of Children guided by adequate authority. (Mother's September Affidavit, P. 5).

XXVII

That the Defendants perpetrated misconceptions, misstatements of the law and misstatements of the facts upon the Supreme Court of North Dakota with no notice to the Mother and in a clandestine manner in order to undo that done in the legal manner in the District Court of North Dakota. That the misrepresentations were even worse perpetrated upon the Mother who then led the Children one way while they were pulled another by the Grandparents. That the Grandparents have shamefully used these two small children in a manner adverse to the Children's best interest to fill a void left by the death of their son. That the deception alone is evidence of harmful effect of the Grandparents on the Children.

XXVIII

That the Mother's parental rights to authority over the Children has been terminated by the Supreme Court in an effort to maintain a status quo which is in fact other than is represented by the Defendants.

XXIX

That the Mother gave up custody to the Father and no others. That she has not relinquished any other rights. That the Father being now deceased, she is the only person with custody of the Children. (Mother's September Affidavit, P. 6).

XXX

That the Mother's authority remains in existence by virtue of North Dakota Century Code 14-09-20 until the Court appoints a guardian, until the Children marry, or until the Children reach majority. None of the events which trigger the cessation of parental authority have occurred.

XXXI

That the Mother's rights have not been terminated pursuant to North Dakota Century Code 27-20.

XXXII

That should the Stay remain and the Children continue to be withheld from the Mother, the Mother's rights and authority to supervise the Children will in fact be terminated by the Supreme Court decision - a decision made without the benefit of testimony, without the benefit of an opportunity to evaluate the credibility of the parties, a decision based on misrepresentation, a decision contrary to that of the District Court Judge who not only

saw the parties, and heard the testimony but reviewed the decision in light of the Petition for Reconsideration and in so doing determined that the Children will not be harmed by remaining with the Mother. (Memorandum Opinion, September 12, 1980).

XXXIII

That if the decision of the Supreme Court stands psychological parenting in one or more of the changing cast of characters in the Pailing home will indeed begin. By the time an appeal is heard and perhaps a new hearing ordered with its concomitant long discovery, the Mother will have an insurmountable burden to meet, one created by the Supreme Court at 4:45 P.M. on September 12th without notice to the Plaintiff or participation by the Plaintiff without termination of her rights by statute or cessation of her parental authority.

Because of the foregoing, the provisions of Appellate Rule 27(b) apply and the Stay of Execution Pending Appeal granted on September 12, 1980, should be vacated.

Dated this 19th day of September, 1980.

/s/ Sherry Mills Moore
Sherry Mills Moore
Attorney for Jenny Mansukhani
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing, Jane Doe
and Richard Roe,
Defendants and Appellants.

ORDER

A Motion to Vacate Stay of Execution in this case was filed by the plaintiff:appellee on September 19, 1980. Consistent with the Court's request defendants/appellants filed a Return to that Motion on September 25, 1980. Plaintiff/appellee filed a Reply to the Return to the Motion on September 26, 1980. After consideration the Court;

ORDERED, the Stay previously granted remain in force and effect, that the Motion to Vacate the Stay be denied, and that the case be set for hearing the last day of the November 1980 Term of the Supreme Court.

The Supreme Court of the State of North Dakota convened at 4:00 p.m., this 29th day of September, 1980, with the Chief Justices, the Honorable Ralph J. Erickstad, Justices, the Honorable Wm. L. Paulson, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, and the Clerk of the Supreme Court, Luella Dunn, being present and directed the entry of the above order.

Luella Dunn, Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Case No. 9855

Jenny Mansukhani,
Plaintiff-Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing, Jane Doe,
and Richard Roe,
Defendants-Appellants.

PETITION

Jenny Mansukhani through her counsel petitions the Court for clarification of the meaning of the Order refusing to Vacate and the Stay of the Judgment in this matter.

It has been interpreted by the grandparents and their counsel to mean that the weekend custody granted Jenny Mansukhani by the Divorce Decree is no longer effective.

Would the Court also rule on whether the mother can hire persons bigger than the grandparents to go get her children who are presently being held by the grandparents because they are bigger than the mother?

It has been interpreted by Judge Glasser as being so confusing as to limit any action by him at the District Court level.

In the meantime, the children of Jenny Mansukhani are getting advanced lessons in profanity plus she is not allowed to talk to them if she manages to find where they are concealed.

We petition the Supreme Court for a hearing on visitation rights of the lawful mother and custodian of the children jointly with the deceased father.

Dated this 2nd day of October, 1980.

/s/ Sherry Mills Moore

STATE OF NORTH DAKOTA
Supreme Court
Bismarck

Clerk of the Supreme Court
Mrs. Luella Dunn

October 8, 1980

Ms. Sherry Mills Moore
Attorney at Law
Box 518
Bismarck, ND 58502

Re: Mansukhani v. Pailing, et al.
#9855

Dear Ms. Moore:

The Supreme Court has considered the document entitled "Petition" accompanied by Notice which you filed on October 2, 1980.

I am directed to advise you the Petition is denied. The previous stay order issued by this Court is limited to the change of custody order of Judge Glaser.

Sincerely yours,

/s/ Luella Dunn
Luella Dunn
Clerk of the Supreme Court

LD:cf
cc: Mr. Daniel J. Chapman
cc & enc: The Honorable Gerald G. Glaser
cc: The Honorable Ralph J. Erickstad

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL No. 29959

Jenny Mansukhani,
Plaintiff,

vs.

Donald and Jean Pailing, Sandy Pailing, Jane Doe and Richard Roe,
Defendants.

NOTICE OF MOTION AND MOTION FOR ORDER

Based upon the files and records of this lawsuit together with those attached hereto, and

Whereas by the divorce decree granted October 4, 1977, Jenny Mansukhani was granted reasonable visitation including custody overnight and on weekends, and

Whereas the Supreme Court of North Dakota has in effect not taken jurisdiction over issues of visitation, and

Whereas Jenny Mansukhani has sought and been denied visitation overnight and on weekends,

Jenny Mansukhani hereby moves this Court for an Order directing that Jean Pailing, and Donald Pailing deliver Jennifer Pailing and Allen Anthony Pailing at 3201 East Rosser Avenue, Bismarck, to Jenny Mansukhani at 5:00 P.M. each Friday to be returned to the same address at 8:00 P.M. each following Sunday.

Dated this 9th day of October, 1980.

/s/ Sherry Mills Moore
Sherry Mills Moore
Attorney for Jenny Mansukhani
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing, Jane Doe, and Richard Roe,
Defendants and Appellants.

ORDER

A Petition for Temporary Stay and for Hearing on Stay of Execution with Affidavit in Support was filed by counsel for the appellants in this case. The Court considered the petition and construed the order referred to this Court to mean that the previous stay issued by this Court has been modified by the order of the Honorable Gerald G. Glaser of 17 October 1980. As such it would lead to confusion and disarray and it is hereby

ORDERED, that the Order of the Honorable Gerald G. Glaser dated 17 October 1980 be stayed pending further order of this Court.

IT IS FURTHER ORDERED that the matter be set for hearing on the last day of the November 1980 Term of the Supreme Court at which time the merits of all issues pending before this Court raised by these parties in connection with the above shall be heard.

The Supreme Court of the State of North Dakota convened at 3:30 p.m. this 17th day of October, 1980 with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Wm. L. Paulson, the Honorable Paul M. Sand,

Justices; and the Deputy Clerk of the Supreme Court, Catherine Fox, being present and directed the entry of the above order.

/s/ Catherine Fox
Catherine Fox
Deputy Clerk
Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
CASE No. 9855

Jenny Mansukhani,
Plaintiff-Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants-Appellants.

MOTION TO VACATE STAY PURSUANT TO RULE 27(b)

Sherry Mills Moore being first duly sworn, deposes and says that she is the attorney for the Appellee in the above matter; that she represented the Appellee at a hearing on October 17, 1980, before the Honorable Gerald Glaser, scheduled by this Appellee for the purpose of enforcing visitation privileges as decreed by the Honorable M. C. Fredericks on October 4, 1977. That the hearing was necessitated by refusal of the Appellants (Grandparents) to allow the Appellee (Mother) to visit her children other than for several hours in the presence of a third party. That notice of the Mother's intent to exercise her visitation rights for weekends and overnight was served upon Grandparents. The Grandparents refused the visitation. The Mother through counsel then petitioned the Supreme Court for a clarification of whether their stay of *September 30, 1980,* stayed the Mother's visitation. The Supreme Court on *October 8, 1980,* denied the petition and directed that "(T)he previous stay order issued by this Court is limited to the change of custody order of Judge Glaser". Given this assurance that the Supreme Court had not stayed visitation, the Mother then sought

enforcement of the visitation in the District Court by Motion. The hearing was held October 17, 1980, at 11:30 A.M. Testimony was presented and arguments had. Judge Glaser ordered that the Mother be allowed reasonable visitation including overnight and weekends. He refused to specify how many weekends per month probably because of the Grandparents repeated assurance that a visitation schedule could be worked out.

His decision was based on a finding that the Mother's visitation privileges had never been modified during the life of the Father and the Father's death did not of itself diminish those rights.

The obvious practice developed by the Grandparents in this matter of presenting evidence to the Supreme Court not presented at the District Court hearing on the same matter is tempting to the Mother but because viewed as erroneous, will not be indulged in. Thus, while the Mother could present affidavits and letters of many people showing the children were happy in their visits with her, eager to stay and eager to return, she will not do so. The affiant will however present law on that evidence so produced by Appellant in their Petition for Stay. Dr. Burger was a witness in *Gardebring v. Rizzo,* 269 NW2d 104 (ND 1978). He expressed his view on the role of the noncustodial parent, "The best solution for a child of a divorced couple would be to give the child to one parent, and for all practical purposes consider the other parent as non-existent."

The Supreme Court rejected his view in the same case. Letters from this same person accompanied the Petition for Stay. They were not presented at trial probably because of obvious hearsay. Had an opportunity for cross examination been allowed, the basis for his opinion could have been explored and his bias exposed. Fortunately,

this Doctor's bias has been reviewed by this Court before. Had the letters been presented, the District Court may have found them sufficient to suspend the Mother's visitation in the interest of the children. They were not then presented. *Their basis is unknown. Unexamined testimony by a party with a bias based on beliefs other than the law should not be used to circumvent the findings of a Court based on legally presented evidence.

The Appellant moved the District for a stay. The District Court denied the stay because it would not preserve the status quo - the Mother's existing legal rights to visit the children.

The Order of Judge Glaser was that the Mother be allowed reasonable visitation of her children including weekends and overnight. Judge Glaser made no order giving the Mother custody. Because the Supreme Court's Order of *September 30, 1980,* stayed only change of custody as per *the Supreme Court letter of October 17, 1980,* the allowance of visitation in no way modified the Supreme Court Order. The stay of October 17, 1980, should be vacated.

Dated this 20th day of October, 1980.

Respectfully submitted,

/s/ Sherry Mills Moore
Sherry Mills Moore
Attorney for Jenny Mansukhani
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502

Subscribed and sworn to me this 20th day of October, 1980.

/s/ Agatha J. Horner
Agatha J. Horner, Notary Public
Burleigh County, North Dakota
My Commission Expires 10/11/83

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff-Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants-Appellants.

ORDER

A Motion to Vacate Stay Pursuant to Rule 27(b) was filed with the Supreme Court in this case on October 20, 1980, by counsel for the appellee. After consideration the Court:

ORDERED, that the Motion to Vacate Stay pursuant to Rule 27(b), submitted on behalf of Jenny Mansukhani, be and the same is hereby denied.

The Supreme Court of the State of North Dakota convened at 10:45 a.m. this 21st day of October, 1980, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, Justices; and the Deputy Clerk of the Supreme Court, Catherine Fox, being present and directed the entry of the above order.

/s/ Catherine Fox
Catherine Fox
Deputy Clerk
Supreme Court

80-1591

No.

Office-Supreme Court, U.S.
FILED
JUN 12 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1980

JENNY MANSUKHANI,
Plaintiff and Appellee,
Petitioner,

VS.

DONALD AND JEAN PAILING,
Defendants and Appellants
SANDY PAILING, JANE DOE AND
RICHARD ROE,
Defendants,
Respondents.

RETURN TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Daniel J. Chapman, Counsel of Record
Chapman & Chapman Law Office
Box 1258, 410 East Thayer Avenue
Bismarck, North Dakota 58502
Attorneys for Donald and Jean Pailing

QUESTIONS PRESENTED FOR REVIEW

We would see the only question to be presented for review as being whether the North Dakota court's insistence upon a fair hearing on the question of the best interests of the children before removal of children from a familiar environment in which they have lived for almost four years, since their very tender years, and before removal of children from the only persons now alive that they regard as "parents" is a suspension of the writ of habeas corpus.

Questions of due process and equal protection are specious and are barely referred to or argued in the Petition and we submit that they are not seriously urged by the Petitioner and thus may be deemed to be abandoned.

II

PARTIES

The only real persons to this proceeding are the petitioner, Jenny Mansukhani, who is the mother of the children involved in this proceeding, and Donald and Jean Pailing, grandparents of the children, with whom the children have resided since December of 1976.

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No.

In the Supreme Court of the United States

October Term, 1980

JENNY MANSUKHANI,
Plaintiff and Appelle,
Petitioner,
vs.
DONALD AND JEAN PAILING,
Defendants and Appellants,
SANDY PAILING, JANE DOE AND
RICHARD ROE,
Defendants,
Respondents.

RETURN TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Respondents pray that the United States Supreme Court decline issuance of a Writ of Certiorari to the Supreme Court of North Dakota to review the decision in the case of Jenny Mansukhani, Plaintiff and Appellee v. Donald and Jean Pailing, Defendants and Appellants, Sandy Pailing, Jane Doe and Richard Roe, Defendants.

OFFICIAL REPORT OF OPINION DELIVERED BELOW

The decision and opinion of the North Dakota Supreme Court in *Mansukhani v. Pailing* is reported in 300 N.W.2d 847 (N.D. 1980).

JURISDICTION

Jurisdiction is not denied if, in fact, any provision of the United States Constitution has been violated. We submit that none has.

STATEMENT OF FACTS

This case involves the best interests of two children Jennifer Pailing and Allen Pailing, who have resided in the home of their grandparents, respondents in this proceeding, since December of 1976. When they came to live with their grandparents, Jennifer was two years and one month old and Allen was four months old. In October of the following year, 1977, a divorce decree was entered dissolving the marriage of James and Jenny Pailing, who were the parents of these children. By that decree, custody of the children was given to the father, James Pailing, who resided with his parents for most of the time, but the responsibility of the day-to-day care and nurture of the children was that of the grandparents.

James Pailing was killed on July 22, 1980. On August 4, 1980, a Petition for Writ of Habeas Corpus was filed by Jenny Mansukhani (she has remarried after the divorce decree) and on August 8, 1980, the hearing was held on the Petition, as a result of which the Burleigh County, North Dakota, Trial Court ordered that custody of the children be immediately awarded to Jenny Mansukhani who had last visited with the children on December 11, 1978. The Court did order that there be an adjustment period during which the children would gradually work into their new environment.

Upon appeal, it was ruled that the Trial Court was required to inquire into the best interests of the children at an evidentiary hearing, something that had been denied to the respondents in the initial proceedings before the Trial Court. It was the position

E R R A T A

of the Petitioner, concurred in by the Trial Court, that a natural mother is entitled to custody of children, irrespective of whatever may have occurred prior to the Petition for Writ of Habeas Corpus and that, unless the persons having physical custody of the children can show that the mother is unfit, the children may be taken from the home that they have known as theirs almost their entire life and thrust into unfamiliar surroundings with strangers, albeit one may be a natural parent.

No court has ever found nor has it even been suggested to any court that the children are not being properly taken care of by their grandparents, respondents herein, nor has any court, to date, inquired into the reasons why Jenny Pailing, who now so vigorously seeks custody of these children, virtually abandoned them in December of 1976 and had not seen them from December of 1978 to the death of their father in July of 1980. Nor has anyone, to date, looked into the environment into which the mother seeks to take these children.

It is to inquire into these and other matters that the Supreme Court of North Dakota ordered that the summary award of custody of these children to their mother taking them out of a situation in which virtually the only home that they have known is with their grandparents must be reversed and an evidentiary hearing held to determine the best interests of these children.

No suspension of the Writ of Habeas Corpus has occurred in the State of North Dakota.

ARGUMENT

Petition has postulated in this Petition for Writ for Certiorari and in other courts that the only reason that she does not have custody of her children is that "She is not physically able to snatch her children back nor rich enough to hire someone to do so on her behalf." (See page 9 of Petition)

This might suggest that the courts of North Dakota are not open to the due process of law and that matters of custody are settled by the size of the contestants or the ability of one or the other to procure the unlawful assistance of gangster-types to effect a violation of this state's law relating to kidnapping.

of the Petitioner, concurred in by the Trial Court, that a natural mother is entitled to custody of children, irrespective of whatever may have occurred prior to the Petition for Writ of Habeas Corpus and that, unless the persons having physical custody of the children can show that the mother is unfit, the children may be taken from the home that they have known as theirs almost their entire life and thrust into unfamiliar surroundings with strangers, albeit one may be a natural parent.

Quite the opposite is true. Respondents have urged from the outset of this case that an evidentiary hearing must be held to determine the best interests of the children, a concern which should be of importance to all concerned.

This is not an unusual holding; in fact, it appears to be almost an universally accepted mode of procedure. 39 Am.Jur.2d HAREAS CORPUS, Sec. 148.

Petitioner relies upon *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208, but that is a case which involves an entirely different question. That was an equal protection case which involved the right of an unwed father of illegitimate children to a hearing to determine his fitness for custody of his children just as other parents and the unwed mother are entitled to be heard.

In fact, *Stanley v. Illinois*, supra, is akin to what we have in this matter. Petitioner would urge that she should have the right to take her children out of familiar surroundings and from the only persons living whom the children regard as "parents". Respondents urge that the matter should be heard by a court of competent jurisdiction *before* the disruption of the lives of these children should be permitted, if at all.

Petitioner complains of the fact that there has been considerable delay and that her right, if there be such a right, cannot be exercised because of the refusal of the North Dakota Supreme

Court to bandy these children back and forth pending a final determination of this matter. That delay, however, is largely the fault of Petitioner. It is her insistence that there should be no hearing on this matter that has caused the delay. But for her the hearing would have been held last summer and this matter would likely have been concluded by this time.

Respondents have caused no delay except to exercise rights of appeal available to them under North Dakota law. They agreed to, even sought, an expedited hearing in this matter.

Throughout all of these proceedings, Petitioner has contended that the North Dakota court is incorrectly perceiving the law of Habeas Corpus as it applies to child custody cases. To the contrary, a number of states have taken the same position as that of the North Dakota court. In *Halstead v. Halstead*, 144 N.W.2d 861, the Iowa court reversed an award of a twelve-year-old boy to his mother where the child had lived with his grandparents for the past ten years, holding that the "best interests" test should be applied.

The same result was reached in *Howarth v. Northcott*, 152 Conn. 460, 208 A.2d 540, wherein it is held that the court may, in the exercise of its discretion, determine what is the best for the welfare of the child and that the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.

A few decisions are to the contrary. See, for example, *Raymond v. Cotner*, 175 Neb. 158, 120 N.W.2d 892.

The point is, however that North Dakota is aligned with what appears to be the majority view and the question to be considered by the United States Supreme Court is simply whether or not the determination of the states, such as Connecticut,

Iowa, Virginia, and North Daktoa, offends any Federal law or Constitutional provision.

Petitioner argues, of course, that what the rule in North Dakota and other states does is to suspend the Writ of Habeas Corpus. This court has held, however, in *Swain v. Presley*, 430 U.S. 372 (1977), that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."

Thus, where, as in this instance, the North Dakota court has provided simply that the court should allow enough time to permit a fair evidentiary hearing before permitted the allowance of the writ, the requirements of the constitution have been met.

Not even in those states where the highest courts have held that the "best interests" test in cases of child custody must yield to the right of the parent to have custody do the courts hold that the writ should issue without a hearing to determine the fitness of the parent. In Nebraska, for example, in *Raymond v. Cotner*, supra, that court tried the matter as a de novo proceeding by review of an extensive record that had been made in the trial court. The court, in that case, did not rule, as in this case at bar, that no evidentiary hearing should be permitted because there had been no showing of unfitness, the hearing coming two days after the writ had issued.

In short, Petitioner has cited no case where, as she contends, it has been held that the custody of the child should be forthwith, sans hearing, be turned over to the parent. The only presented in the cases is which of the tests should be applied.

There is, then, no federal question involved and Certiorari should be denied.

Dated this 8th day of June, 1981.

Respectfully Presented,

DANIEL J. CHAPMAN, Counsel of Record
Chapman & Chapman Law Office
P.O. Box 1258, 410 East Thayer Ave.
Bismarck, North Dakota 58502
Attorneys for Donald and Jean Pailing

A1

APPENDIX

STATE OF NORTH DAKOTA
COUNTY OF McLEAN

IN DISTRICT COURT
FOURTH JUDICIAL DISTRICT

James A. Pailing, Plaintiff,	)	Civil No. 11097
vs.	)	
Jenny Pailing, Defendant.	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.**

The above entitled action, having come before the Honorable M. C. Fredricks, Judge of the District Court at the Courthouse in the City of Washburn, McLean County and State of North Dakota, on the 21st day of September, 1977, the Plaintiff appearing in person and by his attorney, Mervin A. Tuntland, and the Defendant not appearing in person or by counsel.

It appearing to the satisfaction of the Court that the Summons and Complaint were duly and personally served upon the Defendant and that the Defendant had in writing set in proper form, consented to a default judgment in the matter.

The Plaintiff having introduced evidence in support of the allegations of his Complaint and the Court having duly considered the evidence and the pleadings in said action and being fully advised in the premises, hereby makes the following:

FINDINGS OF FACT.

I.

That the Plaintiff is a citizen of the United States and is now and has been in good faith a resident of the State of North Dakota, for more than one year last past immediately preceding the commencement of this action.

II.

That the Plaintiff and Defendant were married at Minot, North Dakota, June 7, 1974.

III.

That two children were born to this union, viz: Jennifer Ann - born November 12, 1974 and Allan Anthony - born August 1, 1976.

IV.

That irreconcilable differences have arisen between the parties and it is impossible for the Plaintiff and Defendant to continue their relationship as husband and wife.

The Court having made this Findings of Fact, hereby makes its

CONCLUSIONS OF LAW.

1. That this is an equitable action, triable before the Court without a jury and the Court has jurisdiction of the parties and of the subject matter of this action.

2. That the Plaintiff is entitled to a judgment and decree of this Court dissolving the marriage relationship existing between the Plaintiff and the Defendant and awarding the Plaintiff an absolute decree of divorce.

3. That the Plaintiff be awarded the custody of the two minor children, viz: Jennifer Ann and Allan Anthony. That the Defendant shall have reasonable visitation, rights, including the right to have custody of said children overnight on weekends.

4. That each of the parties be awarded the ownership of all of the property which he or she had in possession at the institution of this action.

5. That the Plaintiff shall pay to the Defendant's attorney, Moody M. Farhart, the sum of Three Hundred Dollars ($300.00) as and for partial attorney fees and costs, and that the Plaintiff shall also pay his own attorneys fees.

6. That either party may remarry at any time after the entrance of this decree of divorce in this action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 21st day of September, 1977.

BY THE COURT:

M. C. Fredricks, District Judge
Fourth Judicial District.

STATE OF NORTH DAKOTA
COUNTY OF McLEAN

IN DISTRICT COURT
FOURTH JUDICIAL DISTRICT

James A. Pailing	)	Civil No. 1107
Plaintiff	)	
	)	
vs	)	**JUDGMENT AND DECREE**
Jenny Pailing	)	
Defendant	)	

The above entitled action, having came before the Honorable M. C. Fredricks, Judge of the District Court at the Courthouse in the City of Washburn, McLean County and State of North Dakota on the 21st day of September, 1977, the Plaintiff appearing in person and by his attorney, Mervin A. Tuntland, and the Defendant not appearing in person or by Counsel.

It appearing to the satisfaction of the Court that the Summons and Complaint were duly and personally served upon the Defendant and that the Defendant had in writing set in proper form, consented to a default judgment in the matter.

The Plaintiff having introduced evidence in support of the allegations of his Complaint and the Court having duly considered the evidence and the pleadings in said action and being fully advised of the premises made its Findings of Fact, conclusions of Law and Order for Judgment:

NOW THEREFORE on motion of Mervin A. Tuntland, attorney for the Plaintiff:

IT IS ORDERED, ADJUDGED AND DECREED:

That the marriage relationship existing between the Plaintiff and the Defendant is dissolved on the grounds of irreconcilable

differences and the Plaintiff is hereby awarded an absolute divorce from the Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff is awarded the custody of the two minor children, viz Jennifer and Allan Anthony; that the Defendant shall have reasonable visitation rights, including the right to have custody of said children overnight and on weekends.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff shall pay the Defendant's attorney the sum of Three Hundred Dollars ($300.00 as and for partial attorney fees and costs, and that the Plaintiff shall pay his own attorneys fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties be awarded the ownership of all of the property which he or she had in his or her possession at the institution of this divorce action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that either party may remarry at any time after the entrance of this decree of divorce in this action.

Witness the Honorable M. C. Fredricks, Judge of the District Court in and for the County of McLean, State of North Dakota, and my hand and seal this 4th day of October, 1977.

R. M. Lundgerg, Clerk of the District Court, McLean County, North Dakota

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Jenny Mansukhani	)	Civil No.
	)	
Petitioner	)	
	)	
v	)	**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**
	)	
Donald Pailing, Jean Pailing, Sandy Pailing, Jane Doe and Richard Roe,	)	
	)	
	)	

COME NOW the Respondents Pailing, by and through their Attorney, and make the following as their Response to the Petition for Writ of Habeas Corpus and attached pleadings, served upon them by the Petitioner on August 5, 1980, and state that:

1. Your Respondent Donald Pailing is the grandfather to the children involved in this action; your Respondent Jean Pailing is the grandmother to the children involved in this action; your Respondent Sandy Pailing is the aunt to the children involved in this action. To the best information of these Respondents, there are no other parties who may be designated as Jane Doe and Richard Roe;

2. The children herein involved are Jenny Pailing (5 years of age) and Allen Anthony Pailing (4 years of age);

3. That by a divorce decree rendered in McLean County, North Dakota, in October of 1977, the custody of these children was placed in their natural Father, James A. Pailing;

4. That the natural Father, and custodial parent, resided with these Respondents, and they all resided together with the children, from the date the children were brought to the Respondents home up to this date.

5. That the Petitioner was represented in the divorce action by Moody M Farhart of Minot; that the natural father was represented by M Tuntland. These respondents are personally aware of the Petitioner's legal representation, due to the attorneys fees which their son paid to said counsel, on the Petitioner's behalf;

6. That the children were brought to these Respondent's home on December 12, 1976, and have resided in the home of these Respondents home since that date. These Respondents have formed an attachment to the children, and the children have formed an attachment to these Respondents. Your Respondents assisted in parenting the children, and assisted the natural Father and custodial parent with all phases of child care, including but not limited to the physical, emotional and financial care and assistance of the children. The home of the Respondents, and their family unit, is the only home and family these children have known since December 12, 1976;

7. The natural Father to these children was killed in a vehicle accident on July 22, 1980; his death has understandably been very hard on these Respondents and the children;

8. The natural Mother and Petitioner in this action, has never been denied visitation with the children, and has had visitation with them on each and every occasion she has requested it or has come to the home of these Respondents to see the children; however, these Respondents did not feel it in the best interests of the children for the Petitioner, who has not established nor carried through with a parental relationship with these children, to take them with her on August 1, 1980;

9. That the visitation schedule of the Petitioner and children is as follows:

1976
Dec 12 - children dropped off at Respondent's home in Butte, ND; Petitioner's mother had been caring for the children and asked these Respondents to babysit. The children were brought to Respondent's home, never picked up, and have resided with these Respondents since that date;

1977
Apr 8
Apr 23
May 6
June 11
-- Oct - divorce Judgment
Nov 5
Nov 12

1978
Feb 27
July 17
Nov 24
Dec 11

The visitation between the Petitioner and the children has always taken place in the home of the Respondents; she has never requested visitation over night. On Nov 5, 1977, she did take the children to her car, and the daughter cried so hard that the Father refused to let her go. Other than these periods of visitation (which were usually for short periods of time) the Petitioner has had no contact with the children: she does not call to speak with them nor inquire about them with these Respondents; she has not sent cards, presents, nor communications of any nature to them; she has not provided nor offered

to provide any financial assistance for them nor has she provided any clothing or other items for them. On the Feb 27, 1978 visitation she did bring Christmas gifts.

Your Respondents have recently moved to Bismarck and are temporarily residing in an apartment until they can find suitable housing. At the time of their move, they let persons in their former community know of the move, particularly persons who may have been acquainted with the Petitioner, and have every reason to believe and do believe that their move and new location and address was communicated to the Petitioner, although they, themselves, did not notify her. However, there have been periods of time when they did not know the whereabouts of the Petitioner, and only through 'gossip' learned of her remarriage.

These children are not acquainted with the Petitioner's new husband, and are not acquainted with the Petitioner's daughter by this marriage. To wrench these children from the only home and family they have known, since the boy was 4 months old and the girl 2 years old, and to place them with the Petitioner with whom they do not have a family relationship, in her home with which they are unfamiliar, in a different community and with a stepfather they have never seen, and a stepsister they have never seen, would be contrary to the best interests of these children regardless of whatever other circumstances might be involved. To do so only a short time after the death of their Father, is definately detrimental to these young children;

Your Respondents respectfully request, that arrangements be made to enable the children and the Petitioner to become acquainted, and to gradually work out visitation and contact between the Petitioner and children in a manner that would be in their best interests.

Your Respondents also respectfully request, that prior to custody being placed in the Petitioner, a legal determination be made as to whether or not such custodial arrangement would

be in the best interests of the children. These Respondents offer to the Court, that they have legal standing to intervene and to request custody of the children in themselves; they have acted as psychological parents to these children since December 12, 1976. That their home should be considered by the court, as a home which would offer the children continued stability and that a home study and investigation be had, so as to properly inform the court of all alternatives open to these children.

Dated at Bismarck, North Dakota, this 8th day of August, 1980.

CHRISTENSEN & THOMPSON

By_____
Carma Christensen
Attorneys for the Respondents Pailing
Box 1771
Bismarck, North Dakota 58502

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Jenny Mansukhani, Plaintiff	)	Civil No. 29959
-vs-	)	**PETITION FOR RECONSIDERATION AND STAY OF EXECUTION OF JUDGEMENT**
Donald and Jean Pailing, Sandy Pailing, Jane Doe and Richard Roe, Defendants	)	

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

DANIEL J. CHAPMAN, being first duly sworn, deposes and says that at the request of Donald Pailing and Jean Pailing, he has reviewed the within and above matter; that he was first contacted on Friday, September 5, 1980, at which time he was requested by the said Donald Pailing and Jean Pailing to assume representation for them in this matter; that this affiant has reviewed this matter and verily believes that the Court may have overlooked important law in connection with this case; that the case of *McKay v. Mitzel*, 137 N.W.2d 792 (N.D. 1965) is squarely in point; that in such case the District Court, on habeas corpus, awarded custody of the child to the maternal grandparents, notwithstanding a find by the Court that the father was a fit person to have custody of the child; that *McKay v. Mitzel*, supra, holds that the best interest of the child is superior to the statute

giving preference to the natural parent; that this position is affirmed in *Odegard v. Odegard*, 259 N.W.2d 484 (N.D. 1977), in which an award of custody to the father and the grandparents was upheld by our Supreme Court; also in the case of *In the Interest of D.G.*, 246 N.W.2d 892 (N.D. 1976) our Supreme Court reversed an award of the District Court of custody to a father who returned after a long absence and restored custody of the child to the maternal grandparents; that the Order of the Court in this case simply finds the parties to be fit and proper persons to have custody of the minor children in this case and concludes that custody should be given to the mother on the basis of priority; that this affiant has visited with the children and found them to be happy children and even at this young age being able to state a preference for living in Bismarck with their grandparents; that this affiant has been advised of considerable evidence relative to the Plaintiff, Jenny Mansukhani, which would have a bearing upon the issue of the best interests of these children; that the children have lived with these grandparents since December of 1976 and no harm would come from permitting these children to remain with their grandparents pending a review of this matter; that a proceeding of this kind and of this importance to the children should be held only after an adequate time for the parties to prepare for the issues to be considered by the Court in a proceeding of this matter; that this is unlike a proceeding where the person is incarcerated when a speedy disposition of the habeas corpus matter is mandated; that in view of what this petitioner believes to be a misconception of the law, we respectfully request that this matter be reset for a hearing giving adequate opportunity to the parties to accumulate and present evidence and that this petition be considered a request for a new trial; that further the affiant requests of the Court that the final transfer of the custody to the Plaintiff in this matter be stayed pending the rehearing requested in this matter or until the Court can make a determination as to the advisability of holding the rehearing and this affiant further requests the Court in the event his request is denied that the Court consider a stay of execution on appeal so that in any event the final transfer

of the custody of these children be stayed until futher proceedings.

Daniel J. Chapman

Subscribed and sworn to before me this 10th day of September, 1980.

M. Phyllane Dohn, Notary Public
Burleigh County, North Dakota
My commission expires: 8/20/86

(SEAL)

ORDER STAYING EXECUTION OF JUDGEMENT

The Court having been presented with a Petition for Reconsideration and Stay of Execution of Judgment and the Court having considered the same and having determined that it would be in the best interests of the children involved in this proceeding, it does now hereby stay the final execution of the Judgment entered on the 22nd day of August, 1980, and specifically the Court stays the final transfer of possession and custody of the children to Jenny Mansukhani, which would ordinarily have taken place on the 12th day of September, 1980, and this stay will continue until the further order of this Court.

Dated this _____ day of September, 1980.

BY THE COURT:

Judge of the District Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appelle

-vs-

Donald and Jean Pailing,
Sandy Pailing, Jane Doe, and
Richard Roe,

Defendants-Appellants

AFFIDAVIT OF JEAN PAILING

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

JEAN PAILING, being first duly sworn, deposes and says that she is the grandmother of the children with which this proceeding is concerned; that these children have been living with this affiant and her husband and her son, James, until his death on July 22, 1980, since December 12, 1976; that the only home that these children have known since that time has been that of this affiant and her husband and her son; that the children had not visited with their mother since December 11, 1978, prior to the death of their father who was this affiant's son; that these children are happy children in their present home and are well cared for and this affiant and her husband have been the psychoolgical parents of these children since December of 1976; that while this affiant's son was living he was working out of town and the primary responsibility for the care of these children was with this affiant; that for the past three weeks the children have visited with their mother as required by the Court's Order but they have stated a preference for being in Bismarck and it appears to this affiant that these visits have been upsetting to the

children; that there have been incidents of bed wetting and the children have talked of having no food while they were with their mother; that this affiant does not believe that they did not have food but she does believe that the experience has been upsetting to the children; that this affiant verily believes that a transfer of custody of these children to the mother would be a traumatic and devastating experience for these children, particularly in view of the very recent death of their father; that this affiant is concerned about the best interest of the children and information has been given to this affiant to the effect that the children would not have a good home with the Petitioner; that from the time this affiant and her husband were served with papers in this proceeding it was only 3 days until a hearing was held and this affiant and her husband had no opportunity to seek and obtain evidence with regard to the character of the home into which it was sought to place these children; that there were no home studies of the home of the mother, no person testified other than the mother as to the conditions of the home and her concern for her children; that there was no opportunity to present any evidence relating to the home or living conditions of the mother because of the shortness of the time between the service of the Writ and the holding of the hearing; that it is the understanding of this affiant that the Court ruling in favor of the mother in this case was based upon priority of custody to the natural mother and this affiant and her husband were not aware of their right to show that it would be in the best interest of the children to remain with them, at least for the present; that this affiant and her husband reside in the City of Bismarck and her husband is employed at the VFW Club; that if custody is retained in this affiant and her husband the status quo will simply be maintained whereas if custody is given to the mother it is very likely that severe and lasting adverse results will occur to the children.

_____

Jean Pailing

Subscribed and sworn to before me this 12th day of September, 1980.

Daniel J. Chapman, Notary Public
Burleigh County, North Dakota
My commission expires: 1/18/84

(SEAL)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appellee

-vs-

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,

Defendants-Appellants

PETITION FOR STAY OF EXECUTION PENDING APPEAL

Come now the Appellants in the above matter who petition the Supreme Court for a Stay of Execution pursuant to the provisions of Rule 8a of the Rules of Appellate Procedure for the reasons set forth as follows:

I.

That this proceeding was commenced with a Petition for Writ of Habeas Corpus, dated the 4th day of August, 1980.

II.

That the appellants were served with a copy of the Writ on the 5th day of August, 1980, and a hearing was held at 9:30 A.M. on the 8th day of August, 1980.

III.

That the hearing on said Petition lasted less than 1½ hours, as a result of which the Honorable Gerald G. Glaser, Judge of the District Court, South Central Judicial District, issued an Order granting the Writ according to an Order, a copy of which is attached hereto and made a part hereof.

IV.

That the Petitioner in this case is the mother of Allen Anthony Pailing and Jennifer Ann Pailing and said Petitioner was divorced from James Pailing, the son of these appellants.

V.

That in the divorce proceeding custody of these minor children was given to James Pailing and the children have resided with these appellants and their son, James, since December 12, 1976, and it is the only home that they have known since that time.

VI.

That prior to the commencement of these proceedings, the Petitioner had not exercised her right of visitation even though she lived within the State of North Dakota and within 120 miles of the home of the children and she had not seen the children since December 11, 1978.

VII.

That these children do not know the Petitioner as their mother and they are happy and well adjusted in their present home.

VIII.

That on July 22, 1980, James Pailing was killed in an automobile accident, whereupon these proceedings were commenced.

IX.

That the ruling of the District Court as set forth in its Order attached hereto is that the Plaintiff is a fit and proper person for the care and custody of the minor children of the parties and that these appellants, grandparents of said children, are also fit

and proper persons for the care and custody of the children, but that the mother, having a priority over said children should be awarded custody.

X.

That such a ruling is contrary to the case of *McKay v. Mitzel*, 137 N.W.2d 792 (N.D. 1965) in which a District Court awarded custody of a child to her maternal grandparents in a habeas corpus proceeding after the death of the mother to whom custody had been given.

XI.

That this Court squarely held that the best interest of the child is superior to the statute giving preference to the natural parent and this holding was examined in *Odegard v. Odegard*, 259 N.W.2d 484 (N.D. 1977) in which an award of custody of the father and the grandparents was upheld by the Court.

XII.

That in the case of *In the Interest of D.G.*, 246 N.W.2d 892 (N.D. 1976) this Court reversed an award of the District Court of custody to a father who had returned after a long absence and this Court restored custody of said child to the maternal grandparents.

XIII.

That the Order of the District Court in this case fails to take up the question of the best interest of the children and simply relies upon the statutory preference.

XIV.

That the appellants filed with the District Court a Petition for Reconsideration and Stay of Execution of Judgment and this has been denied.

XV.

That the provisions of the Order of Judge Glaser in this matter require permanent transfer of custody to the mother on the 15th day of September, 1980, unless the Order of the District Court is stayed.

XVI.

That an Appeal and Undertaking for Appeal has been duly filed in this case with the Clerk of the District Court for the South Central Judicial District and the filing fee has been paid.

XVII.

That all pertinent papers in this file are attached hereto and made a part hereof.

XVIII.

That the transfer of permanent custody of these children to their mother at this time would be an unnecessary traumatic occurrence in their lives, recently marred by the death of their father.

XIX.

That the children cannot be transferred to the care of the mother at this time without permanent and damaging effect upon the children.

XX.

That appellants assert that there is a reasonable chance that they will prevail on appeal.

XXI.

That it is in the best interest of these children that the status quo be maintained until the matter may be determined by this Court.

WHEREFORE, appellants pray that this Court issue an immediate temporary stay of the Order of the District Court requiring delivery of the custody of these children to the mother on the 15th day of September, 1980, and that a hearing be held on a stay pending this appeal pursuant to the provisions of Rule 8a of the Rules of Appellate Procedure.

Dated this 12th day of September, 1980.

CHAPMAN & CHAPMAN
Attorneys for Appellants
Donald Pailing and Jean Pailing
410 East Thayer - P.O. Box 1258
Bismarck, North Dakota 58502

by _____
Daniel Chapman

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appelle

-vs-

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,

Defendants-Appellants

AFFIDAVIT IN SUPPORT OF RETURN TO MOTION TO VACATE STAY OF EXECUTION PENDING APPEAL

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

DONALD PAILING and JEAN PAILING, being duly sworn, depose and say that they are the grandparents of Jennifer Pailing and Allen Pailing; that this affidavit is made in response to the affidavit and return of Jenny Mansukhani in support of her recent Motion filed with the Supreme Court; that these affiants dispute most major points made by Jenny Mansukhani in her affidavit; that they absolutely dispute the idea that the children are not being properly taken care of; that they point out that they are taking care of the children in the same manner as they have always taken care of these children and the only difference is that their son, James, is no longer living; that the children are not subjected to vulgar or improper language; that they are not subjected to "a great deal of drinking activity"; that they have in no way spoken badly to the children of their mother or attempted to influence the children with regard to the possible move to their mother's home; that, to the contrary, the children are terrified of such prospect and these affiants have made every effort to ease their concern with regard to this

problem; that these affiants have a stable home and a loving and caring relationship with the children and it is the same relationship that they have had with these children since December 12, 1976; that these affiants have had one move from Butte, North Dakota, to Bismarck, and they do not have a shifting life style; that it would be in the best interests of these children to remain with affiants until this matter is finally concluded; that Jenny Mansukhani's affidavit is untrue when it states that the father of the children left the children for several months but in fact it was the appellee who left the children to go to live with her parents in Drake on March 17, 1976; that it is not true that appellee was destitute and shown by her own application for employment, a copy of which is attached hereto and made a part hereof; that she worked from January of 1976 to December of 1976 as a bartender and cocktail waitress at Goodrich, North Dakota; that while Jennifer was in the custody of Jenny Mansukhani these affiants took pictures of the sore and improperly tended buttocks and private parts of Jennifer and these are attached hereto and made a part hereof; that Jennifer is now almost 6 years old and these pictures were taken when she was a baby; that, moreover, pictures further were taken of the condition of the trailer when she walked out of it and these are attached hereto and made a part hereof; that these appellants at no time have attempted to make themselves the psychological parents of these children and that they have not poisoned the childrens' minds against their mother; that the mother has not exercised her rights of visitation until the death of James Pailing, the son of these affiants; that they do not know what appellee is talking about as to a changing cast of characters and there is no truth to this whatsoever; that the children do not use bad language and their conduct is exemplary; that these affiants acted at all times at the direction of their attorney who advised them not to discuss the matter of the procedures being taken by their attorney with Jenny Mansukhani; that these affiants were not working to deflect the mother's attention or to lead them down the primrose path; that they did inform the mother as soon as information was given to them of

the existence of the stay order; that they have not shifted the children from building to building or adult to adult but at all times the children have lived with these affiants; that these affiants have moved one time from Butte, North Dakota to Bismarck; that these affiants know of no instances when the mother has been prohobited from taking the children for visitations; that the children are not willing, happy or eager to visit their mother but have cried and become anxious and nervous at the prospect; that they have not used the children contrary to their best interests to fill a void left by the death of their son; that these affiants pledge themselves to a speedy disposition in this matter and that they will do nothing in the interim to deprive these children of the opportunity to see and visit their mother; that they have the best interests of these children at heart and feel that any abrupt change of custody for these children will be traumatic and difficult for the children; that if the Court ultimately orders that the transfer be made that they will do everything that they can to make the transfer easy on the children.

Donald Pailing

Jean Pailing

Subscribed and sworn to before me this 25th day of September, 1980.

Daniel J. Chapman, Notary Public
Burleigh County, North Dakota
My commission expires: 1/18/84

(SEAL)

"WE ARE AN EQUAL OPPORTUNITY EMPLOYMENT COMPANY. WE ARE DEDICATED TO A POLICY OF NON-DISCRIMINATION IN EMPLOYMENT ON ANY BASIS INCLUDING RACE, CREED, COLOR, AGE, SEX, RELIGION OR NATIONAL ORIGIN; OR PHYSICAL DEFECTS"

APPLICATION FOR EMPLOYMENT

PERSONAL INFORMATION

DATE Jan 11 10

NAME Mercredith Jenny D.
(LAST) (FIRST) (MIDDLE)

PRESENT ADDRESS

PERMANENT ADDRESS 108 2nd Ave NW Surrey ND 58788
(STREET) (CITY) (STATE) (ZIP)

PHONE NO. 833-1761 SOCIAL SECURITY NUMBER 502-W-1886

REFERRED BY Minot Lady

EMPLOYMENT DESIRED

POSITION Bartender DATE YOU CAN START NOW SALARY DESIRED ?

ARE YOU EMPLOYED NOW? No IF SO MAY WE INQUIRE OF YOUR PRESENT EMPLOYER —

EVER APPLIED TO THIS COMPANY BEFORE? Yes WHERE — WHEN —

EDUCATION	NAME AND LOCATION OF SCHOOL	YEARS ATTENDED	DATE GRADUATED	SUBJECTS STUDIED
GRAMMAR SCHOOL	Drake	1-8	1910	General
HIGH SCHOOL	Drake	9-12	1914	Academic
COLLEGE				
TRADE, BUSINESS OR CORRESPONDENCE SCHOOL				

SUBJECTS OF SPECIAL STUDY OR RESEARCH WORK —

U.S. MILITARY OR NAVAL SERVICE — RANK — PRESENT MEMBERSHIP IN NATIONAL GUARD OR RESERVES —

ACTIVITIES OTHER THAN RELIGIOUS (CIVIC, ATHLETIC, FRATERNAL, ETC.) —

* EXCLUDE ORGANIZATIONS THE NAME OR CHARACTER OF WHICH INDICATES THE RACE, CREED, COLOR OR NATIONAL ORIGIN OF ITS MEMBERS.

(CONTINUED ON OTHER SIDE)

FORMER EMPLOYERS (LIST BELOW LAST FOUR EMPLOYERS, STARTING WITH LAST ONE FIRST).

DATE MONTH AND YEAR	NAME AND ADDRESS OF EMPLOYER	SALARY	POSITION	REASON FOR LEAVING
FROM May 81	Mexx		Barlady	was going
TO Aug-Sept 88	Jane's Hotel	25-30	Barlady-Cocktail	to have a baby
FROM April 87			Barlady-	only part time
TO Aug 87	Eddie Mac's Mexx	230	Cocktail	years to school
FROM Jan 86			Barlady-	
TO Dec 86	Walter Mackie	225	Cocktail	Was 21
FROM	Cockrell			
TO				

REFERENCES: GIVE BELOW THE NAMES OF TWO PERSONS NOT RELATED TO YOU, WHOM YOU HAVE KNOWN AT LEAST ONE YEAR.

	NAME	ADDRESS	BUSINESS	YEARS ACQUAINTED
1	Walter Mackie	Cockrell	Lawyer	6 yrs
2	Lee Rose	Mexx	Bartender	3 yrs

PHYSICAL RECORD:
LIST ANY PHYSICAL DEFECTS

WERE YOU EVER INJURED? No GIVE DETAILS —

HAVE YOU ANY DEFECTS IN HEARING? — IN VISION? — IN SPEECH? —

IN CASE OF EMERGENCY NOTIFY Mrs. James Field Surrey [illegible]
NAME ADDRESS PHONE NO.

I AUTHORIZE INVESTIGATION OF ALL STATEMENTS CONTAINED IN THIS APPLICATION. I UNDERSTAND THAT MISREPRESENTATION OR OMISSION OF FACTS CALLED FOR IS CAUSE FOR DISMISSAL. FURTHER, I UNDERSTAND AND AGREE THAT MY EMPLOYMENT IS FOR NO DEFINITE PERIOD AND MAY, REGARDLESS OF THE DATE OF PAYMENT OF MY WAGES AND SALARY, BE TERMINATED AT ANY TIME WITHOUT ANY PREVIOUS NOTICE.

DATE Jan 11 '88 SIGNATURE Jenny Alexander-Lowe

DO NOT WRITE BELOW THIS LINE

TO BE COMPLETED DAY EMPLOYMENT BEGINS DATE Jan 11 '88

HEIGHT 5'5" WEIGHT 135 AGE 23 DATE OF BIRTH 4-7-56

SINGLE MARRIED X WIDOWED CITIZEN U.S.A. yes SEX F

THE ABOVE INFORMATION NEEDED FOR PENSION, HOSPITALIZATION INSURANCE, ETC., AND NOT FOR HIRING PURPOSES.

INTERVIEWED BY		DATE	REMARKS	
NEATNESS			CHARACTER	
PERSONALITY			ABILITY	

HIRED FOR DEPT. POSITION WILL REPORT SALARY WAGES

APPROVED: 1. 2. 3.
EMPLOYMENT MANAGER DEPT. HEAD GENERAL MANAGER

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appellee

-vs-

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,

Defendants-Appellants

AFFIDAVIT IN SUPPORT OF RETURN TO MOTION TO VACATE STAY OF EXECUTION PENDING APPEAL

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

DANIEL J. CHAPMAN, being first duly sworn, deposes and says that he is the attorney for the Defendants-Appellants in the above matter and he makes this Affidavit in support of a Return to Motion to Vacate Stay of Execution Pending Appeal; that this affiant did not handle this case originally and his first contact with the appellants was on the 5th day of September, 1980; that he then researched this matter over the weekend and attempted to set up a hearing with the Honorable Gerald G. Glaser, Judge of the District Court, South Central Judicial District, who sat on this case and ruled upon it; that this affiant was in this Court in another case on the 8th day of September, 1980 and had a hearing in Federal Court during most of the afternoon of that day; that on the 9th day of September, 1980, this affiant went to the Courthouse to attempt to set up the hearing before Judge Glaser and found that Judge Glaser was out of town and would not be back in town at the earliest until Wednesday, the 10th of September; that this affiant then attempted to contact the Honorable M.C. Fredricks, who was

the judge who sat on the divorce involving James Pailing and Jenny Mansukhani and this affiant reached Judge Fredricks to request that he assume jurisdiction but he declined to do so for the reason that he is no longer in the South Central Judicial District; that this affiant then presented the problem to the Honorable Benny Graff, Chief Judge of the South Central Judicial District, and this affiant explained the urgency of getting some judge to consider this matter before Friday as that was the date when the children were to be finally transferred to Jenny Mansukhani; that Judge Graff and this affiant agreed that a petition would be filed and handed to Judge Graff and he would discuss the matter with Judge Glaser if Judge Glaser happened to stop by the Courthouse during his vacation; that Judge Graff agreed that if Judge Glaser could not be reached he would sign a temporary stay order; that this procedure was followed and it was impossible to set up a hearing because of the fact that Judge Glaser was on vacation and we were merely seeking a temporary stay so that this matter could be reconsidered by Judge Glaser; that this affiant was in Sioux Falls taking a deposition on Thursday, the 11th of September; that on Friday, the 12th of September, 1980, this affiant attempted to reach Judge Glaser at the Trial Advocacy Seminar at the Holiday Inn and was unable to find him; that this affiant was advised at the Seminar by Judge Graff that Judge Glaser had returned to town and had received the petition filed by this affiant; that this affiant then determined that Judge Glaser was at the Burleigh County Courthouse and this affiant went to see Judge Glaser and found that he had already ruled against the stay; that the only alternative was to seek a stay in the North Dakota Supreme Court and appeal papers were filed and the temporary stay sought; that this affiant at no time acted in a "clandestine" manner and the Court will note that our application for the stay in this matter simply requested a temporary stay and a hearing on our request for the stay; that no attempt was made to deprive the Plaintiff-Appellee, Jenny Mansukhani, of any of her rights to notice prior to any action by the Courts but the restraints of time required that action be taken in this unusual fashion or irreparable

harm would occur to these children; that this affiant has visited with these children and finds them to be outstanding children who obviously have a good relationship with their grandparents and aunt; that there is not the slightest doubt in the mind of this affiant from the things that this affiant has thus far learned that it would be the best interests of these children to remain with their grandparents pending the disposition of this appeal; that this affiant would have no objection to an expedited appeal and that transcript was promptly ordered and may even at this time be completed as our last contact with the reporter indicated that it was almost done; that for appellants' part there is no reason why this matter cannot be argued in November and would abide by any time table which the Court may set up to facilitate this expedition of the appeal; that this affiant suggested to the appellants that they not indicate to the mother of the children what this affiant was attempting to do so that no breach in the arrangements would occur if the efforts were unsuccessful.

Daniel J. Chapman

Subscribed and sworn to before me this 25th day of September, 1980.

M. Phyllane Dohn, Notary Public
Burleigh County, North Dakota
(SEAL) My commission expires: 8/20/86

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appelle

-vs-

Donald and Jean Pailing,
Sandy Pailing, Jane Doe and
Richard Roe,

Defendants-Appellants

AFFIDAVIT OF MARJORIE CRISSEY

STATE OF NORTH DAKOTA)
: ss
COUNTY OF McLEAN)

MARJORIE CRISSEY, being first duly sworn, deposes and says that she is the manager of the Butte Exchange of the Bank of Turtle Lake; that she has lived in the town of Butte for a number of years and is well acquainted with Donald Pailing, Jean Pailing, Sandy Pailing, and the children of the late James Pailing and Jenny Mansukhani; that she has seen the Pailing children in the presence of their grandparents and she has observed that there is a loving relationship between these children and their grandparents, Mr. and Mrs. Donald Pailing; that these children are weil cared for, are clean, well clothed and well fed; that to the contrary when these children were in the custody of their mother they were not well cared for and this affiant saw the oldest child, Jennifer, at the time that Jenny Mansukhani had custody of said children and this affiant observed that the child had the worst rash on her buttocks and private parts that this affiant has ever seen; that this affiant's daughter was baby sitting said child at the time; that this affiant knows Sandy Pailing, as well as Donald Pailing and Jean Pailing and she

knows Sandy Pailing to be a responsible person and one who loves and cares for these children; that this affiant does not believe that any of the persons mentioned herein would do anything detrimental to the welfare of these children and in fact this affiant feels that the welfare of these children would be best served by placing these children in the care and custody of Mr. and Mrs. Donald Pailing.

_____

Marjorie Crissey

Subscribed and sworn to before me this _____ day of September, 1980.

_____

Notary Public, McLean County
State of North Dakota
My commission expires:

(SEAL)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jenny Mansukhani,

Plaintiff-Appelle

-vs-

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,

Defendants-Appellants

RETURN TO MOTION TO VACATE STAY OF EXECUTION PENDING APPEAL

Come now the appellants in the above matter who, for Return to the Motion of the appelle, show to the Court, as follows:

I.

That the appellants in this matter, through their attorney, acted at all times with propriety and within the scope and intent of the Rules of Civil Procedure and the Rules of Appellate Procedure.

II.

That the appelle complains of notice in this proceeding but the notice in the instant proceeding by which custody of these children was sought to be taken was given to appellants on the 5th day of August in the afternoon thereof and the hearing was held at 9:30 A.M. on the 8th day of August, 1980.

III.

That, neverthless, the appellants, acting through their attorney, attempted to get the request for stay filed and a temporary

restraining order issued buy the Supreme Court granted the stay without notice of hearing.

IV.

That the appellants, nor their attorney, has ever acted "clandestinely" and they have not impeded justice but have simply sought justice.

V.

That the appellants, in not informing the appelle of actions to be taken by their attorney, were merley acting according to advice from their attorney.

VI.

That no prejudice occurred to the appelle by not being informed of procedures to be taken by the attorney of these appellants.

VII.

That the appellants did not use the period between the Court's order and the appeal to attempt to make themselves the psychological parents and they have not poisoned the children's mind against their mother or done anything improper with regard to this matter but have, to the contrary, attempted to prepare the children for the possible change of custody.

VIII.

That it is a matter of opinion as to who has been the psychoogical parents of the children but these appellants have cared for these children for all of the past 3½ years and during this period of time, their son, the father of the children, has also

been with the children but he is gone and these appellants are the only psychological parents which these children have left.

IX.

That it is necessary that these issues be determined in a proper proceeding, given after reasonable notice, and affidavits and counter-affidavits will not permit a fair and intelligent determination of these facts.

X.

That, in the meantime, permitting the children to be with the only custodians that they have known in recent years is not only sensible but clearly in the best interests of these children.

XI.

That the mother had *not* exercised her visitation rights in recent months until after the death of James Pailing.

XII.

That there has been no changing cast of characters with these appellants and their apartment is not occupied by a "known cast of characters".

XIII.

That the language of the children is not abominable and the affadivit as to the action of these appelants is not only false but it shows no foundation in fact or the manner in which any such information might have been obtained.

XIV.

That these appellants deny that any of the quoted authority applies in this case in view of the fact that custody of these

children was awarded to the father and they have lived with the father and these appellants until the death of the father and this stay merely seeks to maintain the status quo, into which these children were placed almost four years ago.

XV.

That is stay order will in no way have a permanent effect upon the ultimate result in this case.

XVI.

That these appellants would have no objection to an expedited disposition of this appeal and will cooperate in any such effort.

WHEREFORE, these appellants resist the motion of the appellee and ask that it be denied.

Dated this 25th day of September, 1980.

CHAPMAN & CHAPMAN
410 East Thayer - P.O. Box 1258
Bismarck, North Dakota 58502

By_____
Daniel J. Chapman